BALAKRISHNAN DEVARAJ & ANOR A

v.

ADMIRAL COVE DEVELOPMENT SDN BHD

COURT OF APPEAL, PUTRAJAYA B
TENGKU BAHARUDIN SHAH JCA
ABDUL MALIK ISHAK JCA
AZHAR MA'AH JCA
[CIVIL APPEAL NO: W-02-883-2006]
1 JUNE 2010 C

CONTRACT: *Misrepresentation - Sale and purchase of property - Inducement arising from defendant's misrepresentation - Photographs of miniature models show whole project of defendant having direct access to beach and then to sea - Misrepresentation by defendant when condominium* D *unit sold to plaintiffs - Plaintiffs would not purchase any unit in the defendant's condominium project without a sandy beach and accessibility to it - Whether plaintiffs induced to purchase condominium unit by defendant's misrepresentation*

CONTRACT: *Rescission - Sale and purchase agreement - Misrepresentation - Contracts Act 1950, s. 19(1) - Restitutio in integrum still possible - Representee is allowed ample time to consider whether to rescind or affirm contract - Whether any lapse of time does not constitute delay in exercising the right of election* E F

The plaintiffs/appellants are husband and wife. The defendant/respondent is a developer of a condominium project known as the "Marina Bay Condominium" in Port Dickson, Negeri Sembilan ("condominium"). Sometime in March 1995, the first plaintiff visited the defendant's office where he saw a miniature model of the G Marina Bay project displayed. He was very attracted to the project since the condominium had sandy beach front and direct access to the beach. During the official launch of the condominium the first plaintiff was shown a miniature model and a printed brochure of the proposed condominium project showing a sandy beach front. The H first plaintiff selected a unit of the condominium and paid an earnest deposit of RM5,000. The parties entered into a sale and purchase agreement on 31 July 1995 for a unit of the condominium. During the negotiations, the first plaintiff made it explicitly clear to the defendant through its servants or agents at I the official launch that the purpose of purchasing a beach front property was to enable the plaintiffs and/or their guests and children

A to come for weekends and during the holidays and gain access to the sea for swimming and to be able to relax and lay about on the beach immediately upon exiting the back door of his own unit. In order to induce the plaintiffs to enter into the sale and purchase agreement, the defendant through its servants and agents at the B official launch represented to the first plaintiff that the plaintiffs will be able to swim directly upon exiting his own unit. The plaintiffs subsequently discovered that the representations made by the defendant and through the miniature models and brochures were false when the plaintiffs and their family members went to their own C condominium unit for a holiday. The plaintiffs rescinded the sale and purchase agreement on 31 October 2002 and later sued the defendant for loss and expense and not being able to use and enjoy their own unit for the purpose for which the plaintiffs bought it. The High Court dismissed the plaintiff's action and the plaintiffs D appealed to the Court of Appeal.

Held (allowing the appeal with costs)
Per Abdul Malik Ishak JCA delivering the judgment of the court:

E **(1)** A misrepresentation must be a false statement of existing fact which is normally made prior to, or during the preliminary stages of a contract and is made with the intention of and has the effect of inducing the party to whom it is made (representee) to enter into the contract with the representor. To F trigger an inducement, the representee must rely on the representor's statement in the contract and the representor must have the intention or realise that the statement will be relied upon by the representee. (paras 17, 18 & 27)

(2) The miniature model cannot be a "silent model with no such G assertion" of such representation alleged by the plaintiffs as held by the trial court. The miniature model speaks, represents and asserts the presence of the sandy beach and the sea and access to them bearing in mind that DWI testified that "Everything in the miniature model is true." (paras 33 & 34)

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(3) There was misrepresentation on the part of the defendant when the condominium unit was sold to the plaintiffs. It was a false statement of fact that induced the first plaintiff to pay the earnest deposit of RM5,000 and eventually induced the plaintiffs I to sign the sale and purchase agreement for a condominium unit with the defendant. The plaintiffs did not get what the defendant had represented to them – a sandy beach with direct

access to it. Upon discovering the falsity of the representations, the plaintiffs were entitled to rescind the sale and purchase agreement and recover the monies from the defendant. *Restitutio in integrum* is still possible. (paras 43 49 53)

(4) The trial court's finding that the first plaintiff was not induced by the representation because the first plaintiff had already intended to sell his condominium unit at the time of delivery of vacant possession even before verifying direct accessibility to the beach was misplaced. The trial court failed to judicially appreciate the fact that the first plaintiff was too sick to travel with his family to visit his condominium unit and that he had never occupied the condominium unit ever since vacant possession was given to him by the defendant. The trial court also failed to consider the defence of the defendant which was simply a bare denial. (paras 46 & 48)

(5) The representee is allowed ample time to consider whether to rescind or affirm the contract. Any lapse of time does not constitute delay in exercising the right of election. Notwithstanding that the notice to rescind was only issued on 31 October 2002, the delay was not fatal bearing in mind that the first plaintiff was medically unwell. That delay, was not an affirmation of the misrepresentation by the defendant. Accordingly, the appeal is allowed with costs here and below. *In re Scottish Petroleum Company*, at p. 434 (refd). (paras 57 & 58)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif/perayu-perayu adalah pasangan suami isteri, sementara defendan/responden adalah pemaju sebuah projek kondominium di Port Dickson, Negeri Sembilan yang dikenali sebagai "Marina Bay Condominium" ("kondominium"). Lebih kurang pada bulan Mac 1995, plaintif pertama melawat pejabat defendan di mana beliau melihat satu model miniature projek Marina Bay telah dipamerkan di situ. Beliau amat tertarik dengan projek kerana kondominium menghadap ke pantai dan mempunyai akses terus ke pantai. Semasa pelancaran rasmi kondominium plaintif pertama telah ditunjukkan model miniature dan brocer-brocer cadangan projek kondominium yang juga menunjukkan laman pantai yang berpasir. Plaintif pertama memilih satu unit kondominium dan membayar deposit sebanyak RM5,000. Pihak-pihak kemudian memeterai satu perjanjian jualbeli pada 31 Julai 1995 bagi unit kondominium tersebut. Semasa rundingan, plaintif pertama telah menjelaskan kepada wakil atau

pekerja defendan semasa pelancaran rasmi bahawa tujuan beliau membeli hartanah di tepi laut adalah bagi membolehkan beliau dan anak-anak serta tetamu-tetamunya datang ke situ di hujung minggu bagi aktiviti berenang di laut dan menikmati suasana pantai dan laut yang berada hanya di belakang unit kondominiumnya. Bagi mendorong plaintif supaya memeterai perjanjian jualbeli, defendan melalui wakil atau pekerjanya semasa pelancaran rasmi menyatakan kepada plaintif pertama bahawa plaintif-plaintif boleh pergi berenang sejurus selepas membuka pintu belakang unitnya. Plaintif-plaintif kemudian mendapati bahawa representasi yang dibuat oleh defendan melalui model miniature dan juga brocer-brocer adalah palsu, apabila plaintif-plaintif dan ahli keluarga mereka pergi ke kondominium mereka untuk bercuti. Pada 31 Oktober 2002 plaintif-plaintif telah membatalkan perjanjian jualbeli dan kemudian menyaman defendan untuk kerugian dan perbelanjaan yang ditanggung kerana tidak dapat menggunakan dan menikmati unitnya bagi tujuan-tujuan untuk yang mana unit tersebut dibeli. Mahkamah Tinggi menolak tuntutan plaintif-plaintif dan plaintif-plaintif merayu ke Mahkamah Rayuan.

Diputuskan (membenarkan rayuan dengan kos)

Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Salahnyataan hendaklah merupakan satu kenyataan palsu mengenai fakta sedia ada yang dibuat sebelum atau di peringkat awal kontrak dan dibuat dengan niat untuk mendorong dan mempunyai kesan mendorong pihak kepada siapa ianya dibuat (representee) untuk memeterai kontrak dengan representor. Bagi membangkitkan dorongan, representee hendaklah bergantung kepada kenyataan representor di dalam kontrak dan representor mestilah mempunyai niat atau menyedari kenyataannya akan dijadikan pergantungan oleh representee.

(2) Model miniature bukanlah suatu "model bisu yang tidak menegaskan apa-apa" terhadap representasi yang didakwa oleh plaintif-plaintif sepertimana yang diputuskan oleh mahkamah bicara. Model miniature sebenarnya bercakap, membuat kenyataan dan menegaskan mengenai kewujudan pantai berpasir dan laut serta akses kepada kedua-duanya, mengambilkira keterangan DWI bahawa "setiap satu di dalam model miniature adalah benar."

(3) Terdapat salah nyataan di pihak defendan bilamana unit kondominium dijual kepada plaintif-plaintif. Ia adalah satu kenyataan fakta palsu yang mendorong plaintif pertama untuk membayar deposit RM5,000 dan akhirnya mendorong plaintif-plaintif untuk menandatangani perjanjian jualbeli untuk satu unit kondominium dengan defendan. Plaintif-plaintif tidak mendapat apa yang direpresentasikan oleh defendan kepada mereka – pantai yang berpasir dengan akses terus kepadanya. Setelah menyedari kepalsuan representasi, plaintif-plaintif berhak untuk membatalkan perjanjian jualbeli dan mendapat kembali wang dari defendan. *Restitutio in integrum* masih boleh terpakai.

(4) Dapatan mahkamah bicara bahawa plaintif pertama tidak didorong oleh representasi kerana plaintif pertama sudah pun berniat untuk menjual unit kondominiumnya semasa penyerahan milikan kosong sebelum mengesahkan akses terus ke pantai, adalah tersasar. Mahkamah bicara gagal menilai secara kehakiman fakta bahawa plaintif terlalu uzur untuk turut serta dalam perjalanan dengan keluarganya untuk melawat unit kondominium sejak penyerahan kosong diberikan kepadanya oleh defendan. Mahkamah bicara juga gagal untuk menimbang pembelaan defendan yang hanya merupakan penafian kosong semata-mata.

(5) Seorang representee diberikan masa yang panjang untuk menimbang sama ada untuk mengesahkan atau membatalkan kontrak. Maka dalam melaksanakan hak untuk memilih, sebarang perlaluan masa tidak akan menjadi satu kelengahan. Ianya menurut bahawa walaupun notis untuk membatal hanya diberikan pada 31 Oktober 2002, kelengahan tidaklah fatal mengambilkira plaintif pertama berada dalam keadaan uzur. Kelengahan juga bukan pengesahan terhadap salahnyataan defendan. Oleh itu, rayuan dibenarkan dengan kos di sini dan di bawah (*In re Scottish Petroleum Company* (dirujuk)).

Case(s) referred to:

Aaron's Reefs, Limited v. Twiss [1896] AC 273 ***(refd)***

Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Anor Appeal [1999] 3 CLJ 231 CA ***(refd)***

Arnison v. Smith [1889] 41 Ch D 348 ***(refd)***

Blackburn And Others v. Smith [1848] 154 English Reports 2 Exch 783 ***(refd)***

Compagnie Chemin de fer Paris – Orleans v. Leeston Shipping Company (Limited) [1919-1920] 36 TLR 68 ***(refd)***

Eaglesfield v. Marquis of Londonderry [1876-77] 4 Ch D 693 ***(refd)***

A *George Urquhart v. Duncan Macpherson [1877-78] 3 App Cas 831* ***(refd)***
IB Coaks, CJ Bunyon, FE Watson, W Cadge, EK Harvey, C Bailey, And J Cross v. JF Boswell and Others [1886] 11 App Cas 232 ***(refd)***
In re Scottish Petroleum Company [1883] 23 Ch D 413 ***(refd)***
Lagunas Nitrate Company v. Lagunas Syndicate [1899] 2 Ch 392 ***(refd)***
B *Newbigging v. Adam [1887] 34 Ch D 582* ***(refd)***
Peter Long & Partners v. Burns [1956] 3 All ER 207 ***(refd)***
Sim Thong Realty Sdn Bhd v. Teh Kim Dar [2003] 3 CLJ 227 CA ***(refd)***
Smith v. Chadwick [1881-82] 20 Ch D 27 ***(refd)***
The Sheffield Nickel And Silver Plating Company, Limited v. Unwin [1876-77] 2 QBD 214 ***(refd)***
C *Thorpe v. Fasey [1949] 1 Ch 649* ***(refd)***
William Smith v. David Chadwick, John Oldfield Chadwick, Ebenezer Adamson, And Edwin Collier [1883-84] 9 App Cas 187 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 18(a), (b), (c), 19(1)

D

For the plaintiffs/appellants - JB Reuben Netto; M/s SL Tan & Assoc
For the defendant/respondent - Andrew Chiew Ean Vooi (Ivan Ong Chee Kong with him); M/s Lee Hishammuddin Allen & Gledhill

E *Reported by Susheila Sreedharan*

JUDGMENT

Abdul Malik Ishak JCA:

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Introduction

[1] In this appeal we shall refer the parties to what they were referred to in the High Court. Thus, Balakrishnan a/l Devaraj and Girija Devy a/p Gopinath Nair shall be referred to as the plaintiffs, while Admiral Cove Development Sdn Bhd shall be referred to as the defendant.

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[2] This is an appeal against the decision of the High Court sitting at Kuala Lumpur ("trial court") after a full trial. The trial court dismissed the plaintiffs' claim with costs. We heard the appeal and we unanimously allowed it in favour of the plaintiffs.

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Background Facts

[3] The plaintiffs are husband and wife and they reside at Bandar Sunway, Petaling Jaya, Selangor.

I

[4] The defendant, on the other hand, is a developer of a condominium project known as the "Marina Bay Condominium" at Mukim Sri Rusa, daerah Port Dickson, Negeri Sembilan ("condominium"). A

[5] Sometime in March 1995, the first plaintiff visited the defendant's office at Sungei Wang Plaza. That visit was chronicled neatly in the witness statement of the first plaintiff in this way (see p. 58 of the appeal record): B

> Sometime in March 1995, I heard about the Marina Bay project developed by the defendant from some friends. So, on or about early March 1995, I went to the defendant's office at Sungei Wang Plaza in Kuala Lumpur to make further inquiries. At the defendant's office, I saw a miniature model of the Marina Bay project displayed in a casing. I was very attracted to the project since the condominium has sandy beach front and have direct access to the sandy beach which is similar to Mutiara Bay in Penang and Regency in Port Dickson. There I met one Mr. Tan Sin Chong who introduced himself to me as the General Manager of the defendant. C D

[6] On 17 March 1995 during the official launch of the condominium at the Shangri-La Hotel, Kuala Lumpur, the first plaintiff was shown by a servant or agent of the defendant a miniature model and a printed brochure of the proposed condominium project showing a sandy beach front, umbrellas, relaxing easy chairs and sale boats close to the beach. And on the same day – that was on 17 March 1995, the first plaintiff selected a unit of the condominium and paid an earnest deposit of RM5,000. E F

[7] By a sale and purchase agreement dated 31 July 1995, the plaintiffs agreed to purchase from the defendant and the defendant agreed to sell to the plaintiffs a unit of the condominium. G

[8] During the negotiations to purchase a unit of the condominium from the defendant, the first plaintiff made it explicitly clear to the defendant through its servants or agents at the official launch that the purpose of purchasing a beach front property was to enable the plaintiffs and/or their guests and children travelling from Petaling Jaya and Kuala Lumpur to come for weekends and during the holidays and gain access to the sea for swimming and to be able to relax and lay about on the beach immediately upon exiting the back door of his own unit. H I

[9] In order to induce the plaintiffs to enter into the sale and purchase agreement, the defendant through its servants and agents at the official launch represented to the first plaintiff that the plaintiffs will be able to swim directly upon exiting his own unit.

[10] Induced by and acting in reliance upon the aforesaid miniature model and/or brochures and/or the representations made by the servants and agents of the defendant, the plaintiffs entered into the sale and purchase agreement.

[11] The plaintiffs discovered that the representations made by the defendant through its servants and agents and through the miniature models and brochures were false when the plaintiffs and their family members went to their own condominium unit for a holiday sometime in August 2002. The plaintiffs discovered the following appalling conditions:

(a) that a long concrete steel like wall was erected right across the sea fronting the plaintiffs' unit;

(b) that rocks, stones and boulders were placed all along the front of the seaside outside the plaintiffs' unit; and

(c) that sewerage discharge being led off visibly into the sea in front of the plaintiffs' unit.

[12] The aforesaid discoveries prevented the plaintiffs from using the beach in front of their own unit.

[13] The wall and rocks permanently affected the plaintiffs enjoyment of their own unit by reason of the diminished aesthetic and/or environmental conditions arising out of the seating and positioning of the wall and rocks.

[14] Once the plaintiffs discovered the true facts, the plaintiffs by their solicitors letter to the defendant dated 31 October 2002 rescinded the sale and purchase agreement. Having suffered loss and expense and not being able to use and enjoy their own unit for the purpose for which the plaintiffs bought it, the plaintiffs sued the defendant and sought for the sum of RM505,313.27. The plaintiffs also claimed for:

(a) a declaration that the plaintiffs have validly rescinded the sale and purchase agreement, alternatively rescission of the sale and purchase agreement;

(b) return of the sum of RM505,313.27;

(c) damages;

(d) further or alternatively damages for misrepresentation;

(e) interest on the amount found to be due to the plaintiffs at such rate and for such period as this Honourable Court thinks fit and just;

(f) costs; and

(g) such further or other reliefs as this Honourable Court deems fit and just.

[15] In the statement of defence, the defence of the defendant comprised of an admission, a denial and putting the plaintiffs to strict proof thereof. The defendant even denied that the plaintiffs entered into the sale and purchase agreement in reliance upon the representations as alleged and pleaded in the statement of claim. The defendant also denied that the plaintiffs have suffered the alleged loss or damage as stated in the plaintiffs' statement of claim. Finally, the defendant prayed that the plaintiffs' claim be struck out and dismissed with costs.

Analysis

[16] The plaintiffs fastened their case on misrepresentation by the defendant and inducement arising from the misrepresentation by the defendant and, consequently, rescission of the sale and purchase agreement.

[17] It is quite common that in the course of the formation of a contract, one party may make representation to another party. Thus, a representation is a statement by one party (the representor) to the other party (the representee) which relates to an affirmation, a denial, a description of a certain fact, present or as to the future. And if the representation is untrue it is termed as a misrepresentation.

[18] Put in another way, a misrepresentation must be a false statement of existing fact which is normally made prior to, or during the preliminary stages of a contract and is made with the intention of and has the effect of inducing the party to whom it is made to enter into the contract with the representor.

[19] Of course, it is always incumbent upon the representee, in order to obtain relief under the doctrine of misrepresentation, to prove to the court the actionability of the misrepresentation. And for a misrepresentation to be actionable, that misrepresentation must be a false statement of fact which induces the representee to enter into the contract. It must not be forgotten that the misrepresentation must be material in nature in that a reasonable man would be influenced by it.

[20] According to the case of *Arnison v. Smith* [1889] 41 Ch. D 348, a statement made by a representor which induced the representee to enter into a contract with him is considered a misrepresentation if it was false or conveyed a false impression to the representee (per Cotton LJ at p. 371 thereof).

[21] The motive of the representor, or his state of mind, is immaterial in determining whether or not his statement is a misrepresentation, although the state of mind is looked at in ascertaining whether a misrepresentation is fraudulent or not. According to Jessel MR in *Smith v. Chadwick* [1881-82] 20 Ch. D 27, at p. 44, CA, that whatever his motive, the representor is liable upon his false statement, and "he cannot be allowed to escape merely because he had good intentions, and did not intend to defraud".

[22] Neither can the representor argue that the representee was not sufficiently diligent in examining the statement simply because the representor did not realise the untruthfulness of the statement (*Aaron's Reefs, Limited v. Twiss* [1896] AC 273, at p. 281, HL).

[23] It must be borne in mind that the representor's statement which has affected the mind of the representee and has induced him to make the contract in question, must be a statement of fact, either existing or past (*Eaglesfield v. Marquis of Londonderry* [1876-77] 4 Ch. D 693, and at p. 709 thereto, James LJ aptly said, "Of course the misrepresentation, if misrepresentation there be, must be a misrepresentation of a matter of fact, ...").

[24] Misrepresentation under the Contracts Act 1950 would include:

(a) the positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true (s. 18(a) of the Contracts Act 1950);

(b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him (s. 18(b) of the Contracts Act 1950); and

(c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement (s. 18(c) of the Contracts Act 1950).

[25] It is quite apparent that misrepresentation as defined in the Contracts Act 1950 covers situations of innocent misrepresentation as understood in common law. The difference between misrepresentation and fraud is this. In fraud, the person making the representation does not himself believe in its truth. In misrepresentation, the representor may believe the representation to be true.

[26] By virtue of s. 19(1) of the Contracts Act 1950, a contract entered into by a party either through innocent or fraudulent misrepresentation is voidable at the option of the party whose consent was so obtained. Thus, the innocent party who had been induced to enter into the contract through an innocent misrepresentation, may choose to set aside the contract of his own accord or by seeking the assistance of the court under the Specific Relief Act 1950 (*Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Anor Appeal* [1999] 3 CLJ 231 CA).

[27] To trigger an inducement, two essential elements are necessary. Firstly, the representee must in fact rely on the representor's statement in the contract concerned. Secondly, the representor at the time of entering the contract, must have the intention, or at least realise, that the statement will, or probably will, be relied upon by the representee.

[28] Thus, both the representee's reliance on a misstatement and the representor's intention to induce are material in cases of misrepresentation. The court would infer that the representor intended to induce by looking at the circumstances in which the representation was made. In *William Smith v. David Chadwick, John Oldfield Chadwick, Ebenezer Adamson, And Edwin Collier* [1883-84] 9 App. Cas. 187, at p. 190, HL, the Earl of Selborne LC had this to say:

> the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts ... .

[29] In *I.B.Coaks, C.J. Bunyon, F.E. Watson, W. Cadge, E. K. Harvey, C. Bailey, And J. Cross v. J.F. Boswell and Others* [1886] 11 App. Cas. 232, at p. 236, the House of Lords observed through Earl of Selborne that:

> A man is presumed to intend the necessary or natural consequences of his own words and acts; and the *evidentia rei* would therefore be sufficient without other proof of intention.

[30] A representation is said to be material if by its nature, it displays a tendency to induce the representee to enter into the contract. In *Smith v. Chadwick* [1881-82] 20 Ch. D 27, at p. 44, CA, Jessel MR aptly said that the representation was:

> of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, ...

[31] All the representee has to prove is that he was, in fact, induced to enter into the contract by the representor.

[32] With all these principles of law in mind, we will now examine the available evidence. The trial court held that there was no misrepresentation by the defendant. At p. 26 of the appeal record, the trial court held that:

> The miniature model of the defendant in this case does not have the kind of fanfare about accessibility to beach. It is completely silent on such feature though it highlighted the feature that all units are facing the sea including living rooms and all bedrooms. The miniature model is hardly assertive of such representation alleged by the plaintiffs. It all remains as a silent model with no such assertion.

[33] But the photographs of the miniature models, at pp. 235 and 236 of the appeal record, speak a thousand words. They say that seeing is believing. The photographs of the miniature models show the whole project of the defendant having direct access to the beach and then to the sea. There was certainly "a lot of fanfare" to be attached to the miniature models because they were built by the defendant (see p. 108 of the appeal record). Under cross-examination, Mr. Tan Sin Chong (DW1) testified as follows (see p. 109 of the appeal record):

> Brochures with price list are for sale and marketing – the purpose of the model to impress – there are other elements. One of the many factors that motivate them.

Q: Can they be impressed through this model? A

A: Not likely.

(Note: Witness trying very hard to get around the answer to avoid owing up that the model is to impress).

B

Q: Is there anything not true in the miniature model?

A: Everything is true.

[34] And at p. 110 of the appeal record, Mr. Tan Sin Chong (DW1) testified that there was no qualification in regard to the C miniature model. It is our judgment that the miniature model cannot be a "silent model with no such assertion" like what the trial court held. It is also our judgment, that the miniature model speaks, represents and asserts the presence of the sandy beach and the sea and access to them bearing in mind that, "Everything in D the miniature model is true."

[35] The only explanation about the sandy beach by the defendant was this: that "presently there are rocks, maybe there will be (a) beach in 20 to 30 years time" (see p. 111 of the appeal record). E But the fact that there will be a beach in 20 to 30 years time was not "informed to anyone" (see p. 112 of the appeal record) or to the plaintiffs for that matter (see p. 111 of the appeal record).

[36] There was a damning piece of evidence emanating from Mr. Tan Sin Chong (DW1). He admitted at p. 112 of the appeal record F that at the time of delivery of the condominium there were no sandy beach nor direct access to the sandy beach as shown in the miniature model. Even the photographs at pp. 231, 232, 233 and 234 of the appeal record confirmed what Mr. Tan Sin Chong (DW1) had testified. G

[37] The first plaintiff seems to have a preference for sandy beaches. In his examination-in-chief, the first plaintiff had this to say (see p. 58 of the appeal record):

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Q: Mr. Balakrishnan, at the material time, you were working in Kuala Lumpur and was residing in Petaling Jaya. Why did you buy the Marina Bay Condominium in Port Dickson?

A: Mr wife, my daughter and I love the sandy beach and Port Dickson is famous for its sandy beach. So, I bought the I Marina Bay Condominium so that my family and I can have a holiday on the sandy beach in our own condominium.

Q: You said you and your family love the beach. Have you been to any beach resorts?

A: Yes, we have been to many beach resorts such as Mutiara Bay in Penang and Regency in Port Dickson, now known as Selesa Beach and Resort. Regency is right next to the Defendant's project.

[38] Further down the same page and spilling over to p. 59 of the appeal record, this was what the first plaintiff said in reply to the questions posed to him:

Q: Did you have any conversation with Mr Tan when you met him?

A: Yes, he was promoting the Marina Bay project to me.

Q: Can you remember what did he say to you?

A: Yes, he pointed out the sandy beach in front of the Marina Bay condominium in the miniature model and told me that I could go for a swim in the beach and after that, I could have another swim in the swimming pool in the condominium. He also said that I could visit the site at Port Dickson if I wish to do so. He also told me that it is a good investment and the rental income is estimated to be about RM280-00 per day. He emphasised that the Defendant's project is a joint venture project between Keretapi Tanah Melayu (KTM) and Reliance Pacific Bhd, an established tour agency, and as such, Reliance Pacific Bhd could bring in tourist to rent the Marina Bay condominium.

Q: Please look at pages 83 and 84 of the Plaintiffs' Bundle of Documents. Is this the miniature model of the Marina Bay project which you saw at the Defendant's office at Sungei Wang Plaza in early March 1995?

A: Yes, this is the miniature model of the Marina Bay project which I saw at the Defendant's office at Sungei Wang Plaza in early March 1995.

Q: Did you take these photographs?

A: Yes I did. (To mark the documents)

Q: When and where did you take these photographs?

A: I took these photographs on 13-10-2002 at the foyer of the Club House of the Marina where the miniature model of the Marina Bay project is displayed.

Q: Is this the same miniature model of the Marina Bay project which you saw at the Defendant's office in early March 1995? A

A: Yes, this is the same miniature model of the Marina Bay project which I saw at the Defendant's office in early March 1995.

B

[39] The first plaintiff is a prudent purchaser. He visited the site where the project was meant to be located. At the site office of the defendant at Port Dickson, he again saw the same miniature model showing the sandy beach. He was thrilled. And he proceeded to pay the deposit. The exchanges at pp. 59 to 60 of the appeal record C went like this:

Q: What happened after your first visit to the Defendant's office?

A: A few days after my first visit, I took up the suggestion of Mr Tan Sin Chong and visited the Defendant's site at Port D Dickson. There, I saw the Defendant's site office and noticed that some reclamation work was being carried out into the sea. I went into the site office and saw the same miniature model of the Marina Bay project which I first saw in the Defendant's office. I then went to the beach and it was a beautiful sandy E beach. I walked along the sandy beach and even had a swim there. After that, I went to the canteen at the Defendant's site office to have a drink. I then went back to Kuala Lumpur and discussed with my wife. We decided to purchase the condominium. About one or two weeks later, I went to the Defendant's office again at Sungei Wang Plaza to place a F booking and choose a unit of the sandy beach front condominium at Marina Bay.

Q: Can you describe the Defendant's site office?

A: It is a huge wooden two-storey house which looks like a rest G house and used by the Defendant as its site office. I was asked by my lawyer to verify whether the Defendant's site office is still there. So, on 11-3-2006, I went personally to the Defendant's site office and saw that it is still there, I also saw a sign board at the entrance of it stating 'Admiral Cove H Development's site office'.

Q: Did you pay any deposit and if so, when and where?

A: I paid the deposit of RM5,000.00 sometime on 21-3-1995 at the Defendant's office on my third or fourth visit to the I Defendant's office.

[40] The miniature model influenced the first plaintiff in purchasing a unit at the condominium project of the defendant. At p. 61 of the appeal record, the first plaintiff expressed his views in these apt terms:

> Q: If the miniature model of the Marina Bay project was not displayed at the Defendant's office at that time, would you have paid the deposit and signed the letter and form?
>
> A: No, I would not have paid the deposit and signed the letter and form.
>
> Q: Why not?
>
> A: The main reason why I decided to buy the Marina Bay condominium was that it has a sandy beach front condominium and my family and I could have direct access to the sandy beach. This is clearly seen from the miniature model at the Defendant's office. If there is no sandy beach or my family and I could not have direct access to the sandy beach, then I will not pay for the deposit and sign the letter and form.
>
> Q: Are you saying that you truly believe that the miniature model is true and was motivated by it?
>
> A: Yes, I truly believe that the miniature model is true and was motivated by it particularly its sandy beach and the direct access to the sandy beach just like the beach in Regency in Port Dickson.

[41] The first plaintiff testified that he was induced by the miniature model representation especially the representation that there will be a direct access to the sandy beach. The representation advanced by Mr. Tan Sin Chong (DW1) too played a role in convincing the first plaintiff to purchase a unit at the condominium project of the defendant. The question and answer sessions at p. 62 of the appeal record went like this:

> Q: Were you induced by the miniature model representation that there will be a sandy beach in front of the condominium and that there will be direct access to the sandy beach?
>
> A: Yes, I was very much induced by the miniature model representation that there will be a sandy beach in front of the condominium and that there will be direct access to the sandy beach.

Q: Other than the miniature model, was there other representations given by the Defendant or its agents? A

A: Yes, the Defendant's representative present, about 2 or 3 of them, including Mr Tan Sin Chong did represent to me repeatedly that the Marina Bay condominium has a sandy beach front and has direct access to the sandy beach. B

[42] The first plaintiff changed the unit which he selected from the 8th floor to the ground floor so that he and his family could have easy access to the sandy beach. All these can be seen in his evidence at pp. 62 to 63 of the appeal record: C

Q: Please tell the Court what happened after you have paid the deposit?

A: About one week after I have paid the deposit, I decided to change the unit to a Ground Floor unit. D

Q: Why did you do that and when was it done?

A: I actually wanted a Ground Floor unit when I first booked but was told that KFC has booked most of the Ground Floor units. But a few days after I paid the deposit, someone from the Defendant's office called me to tell me that there is one Ground Floor unit available. So, on 31-3-1995, I went to the Defendant's office again to change the unit to a Ground Floor unit and selected unit No 1-M which is a bigger unit ie 1,345 sq ft and the purchase price is more ie RM267,787-00. E F

Q: Why did you prefer a Ground Floor unit to a unit on the 8th Floor?

A: With the Ground Floor unit, it is easier for my family and I to go to the sandy beach since our main objective of buying the unit is to enjoy the sandy beach. G

[43] It is our judgment that there was misrepresentation on the part of the defendant when the condominium unit was sold to the plaintiffs. It is also our judgment that the plaintiffs were induced to purchase the condominium unit by the defendant's misrepresentation. H It was a false statement of fact that induced the plaintiffs to enter into the sale and purchase agreement. The plaintiffs did not get what the defendant had represented to them – a sandy beach with direct access to it. The available evidence showed the following state of affairs: I

A (a) that the first plaintiff truly believed that the miniature model was true and was motivated by it (see p. 61 of the appeal record);

(b) that the first plaintiff was induced by the miniature model that
B there will be a sandy beach and a direct access to it (see p. 62 of the appeal record);

(c) that if the miniature model was not displayed, the first plaintiff would not have paid the deposit to purchase the condominium unit (see p. 62 of the appeal record);
C

(d) that there were no brochures or pamphlets at the time when the first plaintiff visited the defendant's office at Sungei Wang Plaza on 21 March 1995 (see p. 58 of the appeal record);

D (e) that the first plaintiff only saw the brochures and the pamphlets when he went for the official launch at the Shangri-La Hotel on 13 May 1995 (see p. 64 of the appeal record);

(f) that when the first plaintiff saw the miniature model, he was attracted to the condominium project since it has a sandy beach
E front and a direct access to the beach similar to The Regency (now known as Selesa Beach) in Port Dickson which is next to the defendant's condominium project (see the photographs at pp. 291 to 295 of the appeal record); and

F (g) that if the first plaintiff wanted to buy a condominium without any sandy beach front or without direct access to the beach, he would have bought one in Kuala Lumpur or Petaling Jaya which is more convenient to him (see p. 66 of the appeal record).

G

[44] The Environmental Impact Assessment studies as seen at pp. 301 to 347 of the appeal record ("EIA report") was only made available in June 1994 to the defendant only. This was some nine (9) months prior to the paying of the earnest deposit by the first
H plaintiff. According to the EIA report, if the marina is not constructed, the shoreline would require precautionary measures such as placing of rocks, stones and boulders and building a surrounding wall. The contents of the EIA report were made known to Mr. Tan Sin Chong (DW1) but not to all the purchasers
I including the plaintiffs. The EIA report was also not reflected in the miniature model for obvious reasons. The plaintiffs would not purchase any unit in the defendant's condominium project without a sandy beach and accessibility to it.

[45] According to the first plaintiff, by comparing the miniature model with the completed condominium project, the whole set-up were entirely different (see p. 100 of the appeal record).

[46] The trial court's finding that the first plaintiff was not induced by the representation because the first plaintiff had already intended to sell his condominium unit at the time of delivery of vacant possession even before verifying direct accessibility to the beach was certainly misplaced. The trial court failed to judicially appreciate the fact that the plaintiff was too sick to travel with his family to visit his condominium unit and that he had never occupied the condominium unit ever since vacant possession was given to him by the defendant. It was only in August 2002 that the first plaintiff together with his wife and daughter visited their condominium unit.

[47] The notes of evidence at pp. 68 to 70 of the appeal record reflected the reality of the matter. Permit us to reproduce them:

Q: Did the Defendant complete constructing the condominium and if so, when?

A: Yes they did complete constructing the condominium sometime in 1999.

Q: Did the Defendant give vacant possession of your unit No 1-M to you?

A: Yes, but I did not collect the keys to my unit No 1-M from the Defendant personally because at that time, I was suffering from colon cancer. I requested my friend to collect for me sometime in 1999.

Q: After you have got vacant possession in 1999, did you visit the condominium immediately or at the near future?

A: No I did not as I was suffering from various diseases such as colon cancer, chronic back pain and other illness. As a result, my mobility to move about and to travel was very much restricted. Pages 1 to 23 of the Plaintiffs' Further Bundle (II) are proof of my diseases and claims from the insurance company and SOCSO. (To mark documents)

Q: When did you first view your condominium after you have got the keys?

A: I first viewed my condominium sometime in August 2002 with my wife and daughter. At that time, I was utterly shocked to find the following:

A (a) a long concrete steel like wall erected about 300 to 400 meters in front of my condominium;

(b) rocks, stones and boulders are placed all along the front of the sea side in front my condominium;

B (c) there is no sandy beach in front of my condominium;

(d) there is no direct access to any sandy beach in front of my condominium.

I then tried to find out why there is no sandy beach and direct C access to the sandy beach in front of my condominium. I went to the management office at the Condominium to get some information. No one there wanted to say anything except "please go to our office in KL". Nobody wanted to say anything about the wall and the condition of the beach front of my condominium unit.

D

Q: What did you do then?

A: I called the Defendant's office but I could not get through the telephone lines. Then when I got through, Mr Tan was not in and I left a message but Mr Tan did not return my call.

E

Q: How did you feel?

A: I became angry and frustrated because I was looking forward to the sandy beach in front of my condominium and the direct access to the sandy beach. I also felt cheated by the Defendant.

F

Q: Then what did you do?

A: I went back to the Condominium site on 13.10.2002 to take some photographs of the wall, the stones and boulders and the surroundings as well as the miniature models of Marina Bay project displayed at the foyer of the Club House of the Marina.

G

Q: Please look at pages 78 to 82 of the Plaintiffs' Bundle of Documents. Are these the photographs you took?

H

A: Yes, these are the photographs I took. (To mark documents).

Q: Please look at page 1 of the Defendant's Further Bundle (II). Is this another photograph of the condominium?

I

A: Yes, this is another photograph of the condominium. (To mark documents).

Q: Can you see any sandy beach in this photograph? A

A: No, there is no sandy beach in this photograph.

Q: Can you see any direct access to the beach in this photograph?

A: No, there is no direct access to the beach in this photograph. The wall, rocks, stones and boulders built by the Defendant have blocked any access. B

[48] It is germane to mention that the trial court failed to consider the defence of the defendant which is simply a bare denial. According to Gopal Sri Ram JCA (later FCJ) in *Sim Thong Realty Sdn Bhd v. Teh Kim Dar* [2003] 3 CLJ 227, CA, that it is contrary to the elementary rules of procedural fairness which require that a party who raises a point of substance either in support of his or her claim by way of defence, is entitled to have the court's view upon it. C D

[49] It is our firm judgment that the defendant made representations which were false and which, being material, did induce the first plaintiff to pay the earnest deposit of RM5,000 and eventually induced the plaintiffs to sign the sale and purchase agreement for a condominium unit with the defendant and, consequently, upon discovering the falsity of the representations the plaintiffs were entitled to rescind the contract and also entitled to recover the monies from the defendant. *Restitutio in integrum* is still possible. E F

[50] It must be borne in mind that the second plaintiff did not give evidence in court. Her absence invited adverse comments against the plaintiffs' case as a whole. The Irrevocable Power of Attorney marked as exh. "P2" and as seen at pp. 352 to 356 irrevocably nominated and appointed the first plaintiff to do a variety of things for the second plaintiff, namely: G

1. To act, give evidence, testify, affirm affidavit(s), execute any document(s)/declaration(s)/undertaking(s)/indemnity, appear, give instruction(s), appoint solicitor(s) and/or do anything whatsoever for and on my behalf in respect of any court proceedings whatsoever including but not limited to Civil Suit No S4-22-154-2003 in the Kuala Lumpur High Court. H

2. To state, settle, adjust, compound and compromise all accounts, claims, demands and difference(s) between myself/ourselves and any other person or persons and if advisable to refer any such matters to arbitration and for that purpose to sign, seal and execute any agreement of reference or any instrument necessary. I

3. To deal with any Court(s) of Law, Solicitors, relevant authorities and financial institution/bank for any matters whatsoever and to execute any documents, undertakings and/or instruments whatsoever as may be required by the same and to collect any documents from the same.

4. To appear before any Judge, Magistrate or any Public Officer from any relevant authorities in connection with any of the matters whatsoever and to execute any documents which may be required by the same. To appeal from any order, judgment, ruling, or decision given against me.

5. To do anything and execute any documents, undertakings and/or instruments on my behalf for any dealings whatsoever.

6. To concur in doing any of the acts and things herein contained with any person or person(s) interested in the premises.

7. To substitute and appoint from time to time one or more attorney or attorneys with the same or more limited powers and such substitute or substitutes at pleasure to remove and another or others to appoint.

And this power of attorney shall be irrevocable in consideration of love and affection.

And generally to do all acts and things and sign and execute all such documents as may be necessary for effectuating any of the purposes aforesaid as full and completely as I myself could do if personally present.

And I hereby agree to ratify and confirm all and whatsoever any of my said Attorney or their substitute or substitutes shall lawfully do in the premises by virtue of these presents.

[51] From the available evidence, it is clear that the first plaintiff was motivated by the lure of the sandy beaches and accessibility to those sandy beaches as reflected in the miniature models and that prompted him and his wife to enter into the contract to purchase those condominium unit. While it is true that the mere puffing and gloating of the defendant's condominium project ought to be taken with the proverbial "pinch of salt", yet when the puffing and the gloating was for the purpose of inducing the first plaintiff representee to enter into the contract with his wife, that puffing and gloating must in law be construed as a representation. According to Mr. Tan Sin Chong (DW1) one of the purposes of the miniature

model was to motivate buyers. Indeed it succeeded in enticing and inducing the first plaintiff to purchase the condominium unit together with his wife.

[52] The law is quite clear. Section 19(1) of the Contracts Act 1950 enacts that a misrepresentation, whether innocent or fraudulent, would entitle the innocent party to rescind the contract. The explanation to s. 19(1) of the Contracts Act 1950 enacts the common law requirement that the misrepresentation must induce the contract. In the instant appeal, the facts showed that the misrepresentation induced the first plaintiff to enter into the contract with his wife on the one hand and with the defendant on the other hand. Thus, in our judgment, *prima facie* the plaintiffs would be entitled to avoid the contract unless it fell within the Exception to s. 19(1) of the Contracts Act 1950. It is not necessary for us to deal with the Exception because it is no part of the defendant's pleaded case that the plaintiffs were not entitled to rescind the sale and purchase agreement on the ground that the plaintiffs had not "the means of discovering the truth with ordinary diligence" – to use the all too familiar statutory formula.

[53] Misrepresentation of the sandy beaches and accessibility to it were pleaded by the plaintiffs. They were entitled to rescind the sale and purchase agreement and for the return of the sum of RM505,313.27 as pleaded in the statement of claim.

[54] Rescission of the sale and purchase agreement is the best remedy if there has been a misstatement or misrepresentation of material facts, by the representor to the representee, with the intention and effect of inducing the representee to enter into the sale and purchase agreement (*Newbigging v. Adam* [1887] 34 Ch. D 582, at p. 592; *George Urquhart v. Duncan Macpherson* [1877-78] 3 App. Cas. 831, at p. 838; *Peter Long & Partners v. Burns* [1956] 3 All ER 207, at p. 214, CA; and *Lagunas Nitrate Company v. Lagunas Syndicate* [1899] 2 Ch. 392, at pp. 426 to 427).

[55] The purpose of seeking the remedy of rescission as a consequence of misrepresentation is to terminate *ab initio* the contract in question. It has the effect of restoring the parties to the *status quo* which existed before the contract was concluded (*Blackburn And Others v. Smith* [1848] 154 English Reports 2 Exch. 783, at 790, per Parke B). In rescission, the requirement of *restitutio in integrum* is essential. In this way, the *status quo ante* of the representee can be restored, or at least everything possible will be

done to place the parties as far as possible to their original position (*Compagnie Chemin de fer Paris – Orleans v. Leeston Shipping Company (Limited)* [1919-1920] 36 TLR 68, at p. 69, per Roche J).

[56] Restitution must be in toto or not at all (*Thorpe v. Fasey* [1949] 1 Ch. 649, at p. 663, per Wynn-Parry J). And according to Lush J in *The Sheffield Nickel And Silver Plating Company, Limited v. Unwin* [1876-77] 2 QBD 214, at p. 223, a contract cannot be rescinded in part and leaving good for the residue.

[57] Some leeway must be given to the representee. The representee is allowed ample time to consider whether to rescind or affirm the contract (per Baggallay LJ in *In re Scottish Petroleum Company* [1883] 23 Ch. D 413, at p. 434). Thus, any lapse of time does not constitute delay in exercising the right of election. It is our judgment that notwithstanding that the notice to rescind was only issued on 31 October 2002, the delay was not fatal bearing in mind that the first plaintiff was medically unwell. That delay, in our judgment, was not an affirmation of the misrepresentation by the defendant.

[58] For the reasons adumbrated above, we unanimously allowed the appeal with costs here and below. We fixed costs at RM5,000. We also granted prayer (a) (a declaration that the plaintiffs have validly rescinded the sale and purchase agreement); prayer (b) (the return of the sum of RM505,313.27); prayer (d) (damages for misrepresentation to be assessed by the same trial court); and prayer (e) (interest on the sum of RM505,313.27 at 8% per annum from the date of judgment to the date of realisation). We also set aside the decision of the trial court.